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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Yolo)

JUANITA SEVILLA et al.,

Plaintiffs and Appellants,

v.

ESTATE OF LYNN MAXEY WILEY, Deceased,

Defendant and Respondent.

C046387
Sup. Ct. Nos.
CVP001566
CVP001567
CVP001568
CVP001569

After a successful motion for summary judgment, defendant sought attorney fees under a contract. In support of the amount of fees, defendant declined to include detailed billing statements with the motion, but instead submitted them only to the trial court for in camera review. Plaintiffs appeal from the award of attorney fees. They contend the secret proceeding, in which the trial court reviewed defendant's detailed billing statements in camera to fix the amount of fees, violated due process.

We agree it was error to keep the evidence in support of the fee award from plaintiffs. Any legitimate concern for revealing privileged information could have been handled by redaction. Because plaintiffs were denied the basic right to see and object to the evidence, we reverse the fee award.

FACTUAL AND PROCEDURAL BACKGROUND

A light plane carrying four skydivers crashed shortly after takeoff, killing the pilot and three of the skydiving passengers and injuring the fourth. Plaintiffs, the survivor and the successors to the estates of the deceased passengers, brought suit against the estate of the pilot, Lynn Wiley, for negligence. Defendant, the Estate of Wiley, moved for summary judgment based on releases the passengers had signed. The trial court granted the motion for summary judgment.

Defendant moved to fix the amount of attorney fees. Defendant claimed entitlement to attorney fees based on the indemnity provision in the release, which provided for reimbursement of "reasonable counsel fees." Defendant was represented by two different sets of attorneys: counsel for the insurance company and *Cumis*¹ counsel for Wiley's husband, Jan Conroy. Both sets of attorneys requested fees.

Cumis counsel requested fees and costs of \$494,853.94, as set forth in the amended costs memorandum. An exhibit to the

¹ *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, superseded by Civil Code section 2860.

memorandum set forth only the identity of each of three attorneys who worked on the case and the total fees for each attorney, and separately the fees incurred in connection with a cross-complaint.

Insurance counsel provided two declarations of counsel. The first, by James Nolan, requested fees and costs of \$285,074.02. Nolan stated the specific time and services rendered were set forth in billing statements. Because the case would be appealed, he asserted it was unfair to let plaintiffs know the amount and type of services rendered during litigation. Nolan requested that the court allow an in camera review of the billing statements to determine if they were reasonable.

A second declaration by Bonnie Cohen informed the court that plaintiffs had appealed from the summary judgment. She asserted it would be extraordinarily prejudicial to reveal the billing statements, which contained "information that reflects the impressions, conclusions, opinions, legal research, and/or theories of the attorneys who defended this case." Cohen renewed the request for in camera review.

Plaintiffs opposed the motions to fix attorney fees, contending defendant failed to document the fees so the court had to deny the motions. Plaintiffs argued the request for an in camera review was contrary to law; under Code of Civil Procedure 1033.5, subdivision (c), defendant had the burden of proof and had to prove the reasonableness of the fees in a contested hearing. Plaintiffs contended that defendant had

forfeited its right to attorney fees by failing to meet that statutory burden of proof.

In reply, defendant argued the request for fees was supported by the sworn declarations of counsel and offered to make detailed time records available for in camera review or to pay for a private judge to review them. Defendant nominated a retired judge, who had decided a fee dispute between *Cumis* counsel and the insurance company.

By order, the trial court found attorney fees were warranted under the terms of the release. It ordered defense counsel to provide detailed billing statements for in camera review.

Plaintiffs appealed from the judgment and this post-judgment order for attorney fees.

Several months later, the court issued an order stating that insurance counsel and *Cumis* counsel has submitted their billing statements and the court had thoroughly reviewed them and the court file on the case. The court fixed attorney fees for insurance counsel at \$95,237.88, and for *Cumis* counsel at \$34,285.75. The court noted the fees awarded were significantly lower than those requested. In determining reasonable fees, the court took into account the extremely acrimonious nature of the litigation, which included heated disputes between *Cumis* counsel and the insurance company, and the lack of cooperation between defense counsel.

Plaintiffs appealed from this order. In their designation of the clerk's transcript on appeal, they requested inclusion of

the billing statements submitted to the trial court for in camera review. Those statements were not included in the record.

In *Sevilla v. Estate of Wiley* (Dec. 8, 2004, C044669) [nonpub. opn.], we affirmed the judgment and the postjudgment order for attorney fees as to the surviving passenger, James Pursel; we reversed the judgment as to the remaining plaintiffs, the survivors of the deceased passengers. Because this appeal was pending, we deferred issues regarding the amount of and the manner of fixing attorney fees. We address those issues now.

DISCUSSION

Attorney fees authorized by contract are recoverable as costs. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).) Unless there is a default judgment or the parties stipulate otherwise, such fees shall be fixed by a noticed motion. (Code Civ. Proc., § 1033.5, subd. (c)(5); *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1724.) The party seeking attorney fees bears the burden of proof. (Code Civ. Proc., § 1033.5, subd. (c)(5).) In amending Code of Civil Procedure section 1033.5 to require a noticed motion, the Legislature found and declared, "that the criteria set forth in Section 870.2 of the California Rules of Court provide a fair and equitable procedure for the motions." (Stats. 1990, ch. 804, § 2, p. 3552.) Rule 870.2 provides the time period for filing the noticed motion when the trial court determines the amount of the fee because the contract refers to "reasonable" fees. (Cal. Rules of Court, rule 870.2(a) & (b).)

"The 'experienced trial judge is the best judge of the value of professional services rendered in his court,'" and the trial court's determination of a reasonable attorney fee will be disturbed only for an abuse of discretion. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.]" (*Ibid.*)

It is not necessary to provide detailed billing statements or timesheets to support an award of attorney fees under the lodestar method. Declarations of counsel setting forth the reasonable hourly rate, the number of hours worked, and the tasks performed are sufficient. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293.)

Defendant timely filed a noticed motion to fix attorney fees, but plaintiffs challenge the procedure by which the trial court determined the amount of attorney fees. Rather than hold a contested hearing at which defendant presented its evidence in support of its fee request, the trial court permitted defendant to present such evidence, detailed billing statements that set forth the time spent and the type of work done, only to the court for in camera review. Plaintiffs were not given the

opportunity to see or to challenge this information, nor was a hearing held on the amount of attorney fees.

Plaintiffs contend this secret proceeding violated their right to due process. They contend it is fundamental that certain procedural protections, including a hearing, be afforded before the state deprives an individual of property. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [47 L.Ed.2d 18, 32]; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 651.) Although there was a hearing on the defendant's right to attorney fees, plaintiffs contend they were denied a hearing on the amount of the fees. They were unable to contest the components of the lodestar amount, either the number of hours spent or a reasonable hourly fee.

Defendant contends the trial court did not abuse its discretion in permitting the in camera review, noting that no California authority prohibits the practice. Defendant suggests the procedure was proper because it was the court that had to review the evidence to fix the fee award and the court could undertake that task without any "assistance" from plaintiffs.

We find the in camera review procedure was improper. The requirement of a noticed motion calls for a hearing at which the party seeking attorney fees has the burden of proof. Evidence in support of the fee request must be presented at the hearing. To keep that evidence from the opposing party shows a remarkable disregard for our adversarial system. The purpose of our adversarial system of justice is, in Justice Roger Traynor's phrase, "'the orderly ascertainment of the truth.'"

(*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 935, quoting *Jones v. Superior Court* (1962) 58 Cal.2d 56, 60.) "This system is premised on the well-tested principle that truth--as well as fairness--is "best discovered by powerful statements on both sides of the question."" [Citations.]" (*Penson v. Ohio* (1988) 488 U.S. 75, 84 [102 L.Ed.2d 300, 311.]) Under our system of justice, plaintiffs were entitled to offer the trial court their "assistance" in fixing the appropriate attorney fee.

Here, plaintiffs were prevented from making "powerful statements" as to the appropriate amount of attorney fees. Parties opposing an award of attorney fees are entitled to review the documentation submitted in support of the award "to make rational arguments and challenge entries." (*Valenti v. Allstate Ins. Co.* (2003) 243 F.Supp.2d 200, 210; see also *Ideal Electronic Sec. Co. v. Intern. Fidelity Ins.* (D.C. Cir. 1997) 129 F.3d 143, 151 ["Ideal is entitled to discover the information it requires to appraise the reasonableness of the amount of fees requested by IFIC, including the nature and extent of the work done by IFIC's counsel on various phases of the case, so that it may present to the court any legitimate challenges to IFIC's claim."].)

The sole reason offered to support the in camera review was that the billing statements contained privileged information, although the court made no finding that the billing statements were privileged. This reason is patently untenable when applied to all the billing statements. Surely not every bill contained privileged information. As noted above, the actual billing

statements were not required to support the fee request; a declaration of counsel summarizing the information is sufficient. (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 254; *Steiny & Co. v. California Electric Supply Co.*, *supra*, 79 Cal.App.4th at p. 293.) Further, any privileged information could have been redacted from the bills. (See *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 454; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1382.)

The attempt to protect the privilege was arbitrary, overbroad and restricted plaintiffs' right to see and object to the evidence in support of the request for attorney fees. Permitting defendant to submit the billing statements in camera only for the court to see was error.

Defendant contends that even if the procedure was flawed, the award of fees should be affirmed for several reasons. First, defendant contends plaintiffs have waived any objection to the in camera review. Defendant asserts plaintiffs never raised the issue below; in particular, plaintiffs never specifically mentioned a due process violation. Defendant contends that by failing to take any action to compel disclosure of the billing records or to object to the in camera review, "plaintiffs lulled defendant and the trial court into believing that they had no objection to in camera review."

Defendant's claim of waiver fails. First, plaintiffs did object to the procedure, pointing out that it was "directly contrary to the law." Plaintiffs argued the amount of attorney

fees had to be proven in a contested hearing under Code of Civil Procedure section 1033.5, subdivision (c). Second, plaintiffs did not abandon their objection; instead, they raised the point in their first appeal. It was defendant who argued the issue was not ripe and should be deferred because this appeal was pending.

Defendant contends plaintiffs failed to provide an adequate record to establish error in the award of attorney fees because they failed to provide either a transcript or a settled statement of the hearings on the fee award. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Defendant relies on the rule that a judgment is presumed correct and all intendments and presumptions are indulged to support the record on matters as to which it is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Plaintiffs are challenging the procedure by which the trial court determined the amount of the fee award. This procedure is set forth clearly in the record on appeal. The trial court ordered defense counsel to submit billing statements for in camera review. The final order recited that counsel had submitted the records and the trial court had reviewed them. The record is not silent as to the procedure used to determine reasonable attorney fees.

Defendant contends there is sufficient evidence to sustain the fee award. Plaintiffs contend there is insufficient evidence in the record. They assert the only evidence in the record in support of the fee award, the cost memorandum and

attorney declarations, fails to provide any evidence from which the lodestar could be calculated. Neither the number of hours spent nor the hourly rate are revealed.

"To enable the trial court to determine whether attorney fees should be awarded and in what amount, an attorney should present '(1) evidence, documentary and oral, of the services actually performed; and (2) expert opinion, by [the applicant] and other lawyers, as to what would be a reasonable fee for such services.' [Citations.] . . . [I]n the absence of such crucial information as the number of hours worked, billing rates, types of issues dealt with and appearances made on the client's behalf, the trial court is placed in the position of simply guessing at the actual value of the attorney's services. That practice is unacceptable and cannot be the basis for an award of fees." (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 558-559.)

We note that information was more critical here because the judge who determined the fee amount had not heard the entire case. The first judge who heard several motions retired while the case was in progress.

Although time records and detailed billing statements are not required, a certain amount of detail is. In *Martino*, a request for a flat fee for "services rendered," without an attempt to explain the extent of services rendered to the client, was insufficient evidence to support a fee award. (*Martino v. Denevi, supra*, 182 Cal.App.3d at pp. 559-560.) In *Curtis v. Estate of Fagan* (2000) 82 Cal.App.4th 270, an attorney

submitted a summary of work performed and a declaration outlining his involvement in the case. This information was insufficient because the work included services for another client and there was no indication an apportionment had been made. (*Id.* at p. 280.) The evidence in the record here is insufficient alone to support the fee award.

Defendant next contends that any error in the procedure is harmless because plaintiffs cannot show prejudice in the fee award; they cannot show a different award was probable. Defendant asserts the award of \$129,523.63 does not shock the conscience and is not manifestly excessive. Plaintiffs respond they cannot show error in the court's calculation of the fee award because they were not permitted to see or object to the evidence supporting the request for the fee award. They simply do not know on what basis the court awarded fees. That the trial court greatly reduced the fee award from the almost \$800,000 requested itself suggests there was much to object to in the requested fees. The prejudice to plaintiffs was that they were denied the opportunity to make those objections which, if properly made, may have obviated any attorney fees at all.

DISPOSITION

The award of attorney fees is reversed and the matter remanded for further proceedings consistent with this opinion. On remand the trial court shall consider the effect, if any, of our prior opinion reversing the judgments as to all plaintiffs, except James Pursel, on the issue of the award of attorney fees. Plaintiffs shall recover their costs on appeal.

MORRISON, J.

I concur:

NICHOLSON, J.

I concur in the result:

DAVIS, Acting P.J.